

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WESTSIDE INNOVATIVE SCHOOL
HOUSE, INC.; LOS ANGELES UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2013090557

ORDER DENYING MOTION TO
BIFURCATE; ORDER GRANTING
CHARTER'S REQUEST FOR
CONTINUANCE; ORDER
FOLLOWING PREHEARING
CONFERENCE

On February 3, 2014, Administrative Law Judge (ALJ) Adrienne L. Krikorian, Office of Administrative Hearings (OAH), held a telephonic prehearing conference (PHC). Attorney Stephen Wyner appeared on Student's behalf. Attorney Whitney Spatz was also present on Student's behalf. Attorney Patrick Balucan appeared on behalf of Los Angeles Unified School District (LAUSD). Attorney Allison Buchner appeared on behalf of Westside Innovative School House, Inc. (WISH). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following Order:

1. WISH's Motion to Bifurcate. On January 29, 2014, WISH filed a motion to bifurcate the issue of statute of limitations. The ALJ heard oral argument on the motion during the PHC and took the matter under submission to allow Student the opportunity to file a written opposition. Student filed an opposition on February 3, 2014. LAUSD did not oppose the motion.

Federal and state laws pertaining to special education due process administrative proceedings do not contain a specific reference to the procedure for bifurcating issues at trial. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Generally, OAH will bifurcate a hearing where the resolution of a threshold question will determine whether the remainder of a hearing will be necessary. For example, OAH has bifurcated specific legal issues such as the statute of limitations because a determination of that issue may reduce or eliminate issues and determine whether the remainder of the hearing will be necessary. Bifurcation limiting parties or issues may further judicial economy.

Here, bifurcation will not serve the interests of judicial economy. This matter is almost five months old and it will be six months old by the time hearing is completed.

Bifurcation on the issue of the statute of limitations would result in a delay of the hearing on the remaining substantive issues in Student's complaint, and, as a result, delay of the issuance of a decision well beyond the 45 day decision time line established by the IDEA. Additionally, the witnesses and documents identified relating to the issue of the statute of limitations have been identified by one or more parties as potential witnesses and exhibits on issues that are not subject to a statute of limitations challenge. As a result bifurcation will not substantially limit or eliminate the need for a hearing. Accordingly, WISH's motion to bifurcate is denied.

2. WISH'S Request for Continuance

On February 3, 2014, counsel for WISH filed a request for a sixty day continuance of the PHC and due process hearing on the ground that new counsel substituted in for WISH on February 1, 2014, and counsel needs time to prepare for hearing. The parties addressed the request during the hearing and advised the ALJ that they had stipulated to continue the matter for approximately six weeks, in part because they wanted to continue settlement discussions. The ALJ considered the request and stipulation at the PHC.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Here, WISH's basis for continuance is counsel's recent substitution into the case, resulting in counsel's need for time to prepare for hearing. However, WISH has been represented by counsel in this matter since September 23, 2013. Substitution of counsel is not a basis for good cause, particularly given the age of this case, where WISH had every opportunity to substitute counsel earlier than the day before the PHC. Additionally, the parties' contention that they want to pursue settlement discussions is not persuasive because they have already participated in mediation and have had almost five months in which to discuss settlement. However, in the interest of fairness, and because of the voluminous list of documents and witnesses identified by Student in his PHC statement, which was not timely filed, good cause exists for a brief continuance. Accordingly, this matter will be

continued for two weeks, shall begin on February 24, 2013, at 1:30 p.m. and shall continue day to day, as provided for in this Order under item number 3.

3. Hearing Dates, Times, and Location.

The hearing shall take place on February 24 -27, March 3-6, 10, and 11, 2014, and continuing day to day Monday through Thursday, at the ALJ's discretion, at OAH's Van Nuys office located at 15350 Sherman Way, Suite 300, Van Nuys, California 91406.

The hearing shall begin at 1:30 p.m. on the first hearing day. At the request of the parties, all other hearing days shall begin at 9:30 a.m., unless otherwise ordered.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

4. Issues. The issues at the due process hearing are listed below.

1) Are any of Student's claims in the complaint barred by the applicable two-year statute of limitations?¹

2) Did LAUSD deny Student a free appropriate public education (FAPE) during the 2010-2011 school year because Student's June 17, 2010 individualized education program (IEP):

a) Failed to specify whether related services in the area of behavior support would be provided either by a non-public agency (NPA) or school staff;

b) Failed to specify the nature, frequency and amount of behavior support services Student would receive;

c) Failed to specify the location where Student would receive behavior support services?

3) Did WISH or LAUSD deny Student a FAPE during the 2010-2011 school year by:

a) Failing to convene an IEP meeting for the 2010-2011 school year in a timely manner;

¹ Although the issue of the statute of limitations is listed separately in this Order, the ALJ may address it in the Decision in the context of each of the substantive issues.

b) Failing to engage a NPA to provide behavior support services to Student during the first 30 days of his enrollment at WISH;

c) Failing to offer an appropriate educational program designed to address Student's unique needs and to enable him to make meaningful educational progress;

d) Failing to provide qualified personnel to implement related services in the area of behavior support;

e) Failing to develop and implement an appropriate behavior support plan?

f) Implementing Student's June 2008 IEP;

4) Did WISH or LAUSD deny Student a FAPE during the 2010-2011 school year by failing to initiate due process seeking an order finding the February 15, 2011 IEP offered a FAPE?

5) Did WISH or LAUSD deny Student a FAPE during the 2011-2012 school year by:

a) Failing to timely hold an IEP meeting;

b) Failing to develop an IEP for Student, including appropriate goals;

c) Failing to offer an appropriate educational program designed to address Student's unique needs and to enable him to make meaningful educational progress;

d) Failing to provide appropriate related services in the area of behavior support, including a behavior support plan;

e) Failing to provide related services in the area of occupational therapy;

f) Failing to provide related services in the area of language and speech;

g) Implementing Student's 2008 IEP?

6) Did WISH or LAUSD deny Student a FAPE during the 2012-2013 school year by:

a) Failing to make an offer of FAPE for the 2012-2013 school year, including appropriate goals;

b) Failing to convene an IEP meeting in a timely manner upon Parents' request;

c) Failing to provide appropriate home hospital instruction for one hour a day from and after September 18, 2012;

d) Failing to provide appropriate related services in the area of behavior support, including a behavior support plan;

e) Failing to provide related services in the area of occupational therapy;

f) Failing to provide related services in the area of language and speech;

g) Implementing Student's 2008 IEP?

7) Did LAUSD or WISH deny Student a FAPE for the 2013-2014 school year by:

a) Failing to hold an IEP meeting to develop an appropriate educational program, including supports, accommodations and related services;

b) Failing to provide appropriate related services in the area of behavior support, including a behavior support plan;

c) Failing to provide related services in the area of occupational therapy;

d) Failing to provide related services in the area of language and speech?

8) Did LAUSD or WISH deprive Parents of the opportunity for meaningful participation in the development of Student's educational program?

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "L" or "W" in front of the exhibit to designate if it is a Student or LAUSD or WISH exhibit (for example, "S-5, S-6, or L-1, L-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents, including the title and date of each exhibit. Email correspondence and miscellaneous correspondence shall be separately identified by date and author and not included *en mass* as one single exhibit.

At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties shall not serve exhibits on OAH prior to the hearing.

Student has identified more than 200 documents as exhibits, some of which are duplicative of those identified by WISH and LAUSD. The parties shall meet and confer by February 12, 2014, regarding exhibits, and they shall make a good faith effort to delete all duplicate exhibits from the exhibit binders, and reduce the number of exhibits where feasible.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of

Education Code section 56505, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. LAUSD and WISH have agreed to cooperate with Student by either providing last known addresses or agreeing to accept service of subpoenas for any witnesses no longer employed by the entities.

The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. The parties shall exchange final witness lists as provided for by Education Code section 56505, subd. (e)(7). Neither party shall be permitted to call any witnesses not disclosed to the other parties at least five business days before the first day of hearing, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by the close of business on February 12, 2014, as to the witness list and schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a detailed schedule which shall include an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. The District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

6. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination, at the discretion of the ALJ.

7. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the

opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. The witness shall testify while in a private room and while using a land-line telephone. No witness will be heard by telephone unless all these requirements have been fulfilled.

The parties reserved the right to request telephonic testimony on the first day of hearing, depending on the outcome of their efforts to meet and confer regarding witness scheduling.

8. Motions. Counsel for LAUSD and WISH requested the opportunity to file a motion *in limine* regarding witnesses identified by Student. The parties shall file with OAH and serve written motions *in limine* to exclude witnesses by not later than noon on February 14, 2014. Oppositions to motions *in limine* to exclude witnesses shall be filed with OAH and served by not later than noon on February 20, 2014.

The ALJ denied LAUSD's oral request at the PHC that OAH relocate the hearing to OAH's downtown offices on the ground that doing so would be more convenient for witnesses.

No other pretrial motions are pending or contemplated. Any additional motions filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the PHC of February 3, 2014.

9. Stipulations. Stipulations to pertinent facts, authenticity of documents, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form signed by counsel for all parties.

10. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ. No party or his or its counsel shall be permitted to engage in text messaging while the hearing is on the record, unless otherwise ordered by the hearing officer.

11. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

13. Hearing Open To the Public. Parents requested that the hearing shall be open to the public. Student's counsel indicated that Student may invite the media to attend the hearing. Student shall, if reasonably possible, file a notice of intent to invite the media with OAH at least 2 business days prior to the first day of hearing.

14. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

15. Failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: February 3, 2014

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings